Supreme Court, U.S.
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No. 01-908

In The

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

CHARLES ROBINSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining whether plaintiffs in a Title VII pattern and practice action have established the existence of common questions of law or fact under Fed. R. Civ. P. 23(a), should the district court weigh evidence and make determinations of the merits or limit its analysis to whether plaintiffs have offered admissible evidence that establishes the existence of common questions of law or fact?

2. In a Title VII employment discrimination class action against a public entity, which does not include claims for punitive damages, may the district court certify the case under Fed. R. Civ. P. 23(b)(2)?

3. In a Title VII employment discrimination class action, may the district court bifurcate the action and certify only the pattern-or-practice liability issues under Rule 23(b)(2)?

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STATEMENT OF THE CASE

This class action alleges that Metro-North Commuter Railroad Company ("Metro-North" or "Petitioner") discriminates against its African-American employees with respect to promotions and discipline. The plaintiffs contend that Metro-North maintains company-wide policies and procedures that violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.* Specifically, plaintiffs allege that Metro-North's company-wide discipline and promotion policies delegate to department supervisors substantial discretion to make decisions and that this authority is exercised in a racially discriminatory manner and has a disparate impact on African-American employees. Plaintiffs seek injunctive relief, monetary damages for lost income, and compensatory damages. They do not seek punitive damages.

The discipline and promotion policies at issue in this case are complicated. There was substantial factual dispute below about the nature of these practices, their impact on African-American employees, and Metro-North's knowledge of the discriminatory effects. The Petition provides only Metro-North's factual contentions on these points.

Metro-North's Progressive Discipline System (PDS) applies to all of its approximately 5000 union employees (Pet. A-42 – A-43). The PDS uses uniform policies for the filing of disciplinary charges, the conduct of hearings and the assessment of punishments. The system is overseen by the centralized Labor Relations Department. It coordinates all-day training sessions of PDS hearing officers, who are provided with a uniform manual for the conduct

of hearings. *Id.* In 1994, Metro-North's own affirmative action officer expressed concern about the high percentage of disciplinary actions involving persons of color, and urged review of past disciplinary actions in one department where employees had complained of discriminatory discipline by their supervisor. *Id.* Plaintiffs provided expert testimony, further described below, which demonstrated statistically significant disparities in the rates of discipline for African-American employees, compared with white employees.

Metro-North has a company-wide policy that requires the posting of all open management positions (Pet. A-43 – A-44). The posting system, administered by the Personnel Department, is in fact often not followed or is merely a pretense because a candidate has already been pre-selected for the open position. Still other union positions – including some that are viewed as stepping-stones to management – are also exempted from the posting system. *Id.* The Metropolitan Transit Authority Inspector General prepared a 1993 report which documented Metro-North's failure to comply with its posting requirements and a pattern of "favoritism" and "willful" violation of company posting rules by a Metro-North senior executive. Even where positions are posted, hiring supervisors have unfettered discretion to select any candidate that they wish. The only company directive is to "hire the most qualified candidate." Statistical analyses demonstrated that there were statistically significant disparities in the promotion rates of African-American and white employees.

Metro-North's own vice-president testified that, historically, the railroad had been predominantly white and

male. The company's data demonstrates that African-Americans continue to be under-represented in management positions and in lower positions from which promotions to management are made. Only 21 of 324 employees in the EEO category for management and professionals are African-American.

Plaintiffs filed a motion for class certification, supported by anecdotal testimony from named plaintiffs and class members, deposition testimony from Metro-North officials, and expert statistical and sociological evidence. The district court concluded that plaintiffs failed to satisfy the Rule 23(a) requirements of commonality and typicality. The Second Circuit reversed because the lower court had weighed the expert evidence, crediting the defense expert over the plaintiffs' expert, which was inappropriate at the class certification stage. *Caridad v. Metro-North Commuter Railroad Co.*, 191 F.3d 283 (2d Cir. 1999) (hereinafter "*Caridad*").

The Petition omits any discussion of the Second Circuit's extensive analysis of the expert evidence that was submitted by both the plaintiffs and the defendant. The appellate court observed, *inter alia*,

- Plaintiffs' expert prepared numerous multiple regression analysis on Metro-North's computerized personnel data for a ten-year time period (Pet. A-45-48);
- These analyses looked at the effect of being black on the likelihood that one would be disciplined or promoted at Metro-North, and controlled for a number of variables; *Id.*
- These demonstrated that African-American employees of Metro-North are 3½ times

more likely than white employees to be disciplined and 1/3 less likely to be promoted to and within management. The probability of this occurring by chance was less than one in 10,000. *Id.*

- The results of these analyses were highly statistically significant for discipline as well as promotion; *Id.*
- The defense expert criticized the plaintiffs' expert for failing to conduct the analysis on a department-by-department basis; *Id.*
- The defense expert found that no disciplinary action had occurred in 25 of 37 departments; *Id.*
- The defense expert conducted no regression analysis himself but based his conclusions on "tallied numbers of disciplinary actions"; *Id.*
- The defense expert criticized the data included in the plaintiffs' promotion analysis; *Id.*
- In response to these criticisms, plaintiffs' expert prepared a supplemental report with additional analyses demonstrating that blacks had higher rates of discipline in 48 positions, representing the vast majority of employees; *Id.*
- The plaintiffs' supplemental report criticized the defense expert for failing to conduct regression analyses and selectively omitting data. *Id.*

The Second Circuit concluded that plaintiffs' statistical evidence, together with the anecdotal evidence presented, met the commonality and typicality requirements

of Rule 23(a). The Court limited the discipline class to those positions where African-Americans had higher rates of discipline, as demonstrated by plaintiffs' supplemental expert report (Pet. A-55). The Second Circuit remanded the motion to the district court for further consideration of the class certification motion. Metro-North's Petition for Certiorari from that decision was denied.

On remand, the district judge again denied class certification because he concluded that the plaintiffs could not satisfy the requirements of Rule 23(b)(2). The Second Circuit reversed. *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001) (hereinafter "*Robinson*"). The *Robinson* decision is discussed at length herein.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT CONFLICT REGARDING THE STANDARD FOR EVALUATING STATISTICAL EVIDENCE AT THE CLASS CERTIFICATION STAGE

A. This Court Has Already Denied Certiorari Once on the First Question Presented

Petitioner seeks a writ of certiorari on the Second Circuit's most recent decision concerning class certification, which addresses whether plaintiffs have satisfied Fed. R. Civ. P. 23(b) class action requirements. *Robinson*, 267 F.3d 147 (2d Cir. 2001). Petitioner previously sought a

writ of certiorari from this Court on the Second Circuit's earlier class certification decision, *Caridad v. Metro-North*, an opinion that addressed only Fed. R. Civ. P. 23(a) requirements. The first Question Presented to this Court in the earlier petition was whether plaintiffs' statistical evidence was sufficient to establish Rule 23(a) commonality, in light of criticisms raised by the defense expert.[1] This Court denied the earlier Petition for Certiorari. *Metro-North Commuter Railroad Co. v. Norris*, 529 U.S. 1107 (2000) (mem). Without acknowledging the prior Petition for Certiorari, Petitioner raises the same question again in this Petition.

The issue is no more worthy of review by this Court now than it was less than two years ago. There is no conflict in the circuits on this point. The standard for review of evidence at the class certification stage, set forth in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), is well understood by the lower courts and was applied appropriately by the Second Circuit in *Caridad*.[2]

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[1] The Question Presented on the earlier Petition for Certiorari was:

> Whether, for purposes of determining whether plaintiffs have satisfied the commonality requirement of Fed. R. Civ. P. 23(a), the District Court is precluded from evaluating the statistical evidence proffered by plaintiffs' statistics expert.

[2] While the current Petition repeats essentially the same question and arguments presented in the prior submission, the *Robinson* opinion, which is the subject of the current Petition, did not address the Rule 23(a) statistics argument that Petitioner raises. Petitioner cites no new legal or factual developments that would justify its repeated attempt to seek review of this issue.

B. The Second Circuit Properly Considered Statistical Evidence of Rule 23(a) Commonality

Petitioner claims that the Second Circuit ignored Metro-North's expert report and accepted the plaintiffs' report "without meaningful scrutiny" (Pet., p. 14). Petitioner has simply mischaracterized the opinion of the Second Circuit.

Far from relying solely on the allegations of the complaint, or blindly accepting plaintiffs' expert submissions, the Second Circuit's opinion contains a very detailed examination of the expert testimony offered by both the plaintiff and defense experts (Pet. A-45 – A-48). The appellate court's examination of the statistical evidence was far more detailed and comprehensive than the cursory summation provided by the district court (Pet. A-80 – A-81). The appellate court reviewed the results of plaintiffs' multiple regression analyses, which demonstrated statistically significant disparities for blacks with respect to both discipline and promotion. It then considered the defense expert's criticism that the plaintiffs' expert had failed to conduct the analyses on a department-by-department basis. It noted that, based on simple tallies rather than regression analyses, the defense expert found that no disciplinary action had occurred in 25 of 37 departments. The court then considered the supplemental report submitted by plaintiffs (which had been ignored by the district court) to answer criticisms raised by the defense expert. These additional analyses demonstrated that blacks had higher rates of discipline in 48 positions, representing the vast majority of employees. *Id.*

The appellate court concluded that the plaintiffs' expert reports supported a finding on commonality on the promotion claim as well as the discipline claim. Notably, however, the Second Circuit limited the discipline claim to those 48 positions in which blacks were more likely to be disciplined than whites, as noted in plaintiffs' supplemental report filed in response to the defense expert's contentions (Pet. A-55). This extensive analysis, and particularly the limitation on the scope of the discipline class, plainly demonstrates that the Second Circuit neither accepted the plaintiffs' expert without scrutiny nor disregarded the defense expert's testimony. It carefully evaluated both and properly concluded that this evidence, together with the non-statistical evidence submitted, met the commonality requirement of Rule 23(a).[3]

C. The *Falcon* Decision Requires a Rigorous Analysis of Rule 23 Requirements, Not an Adjudication of the Common Questions on Their Merits

The Second Circuit's analysis was completely consistent with the standard established by *Falcon*. At issue in *Falcon* was whether the named plaintiff in a Title VII class action, an employee who had been denied a promotion,

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[3] Recognizing the difference between plaintiffs' showing under Rule 23 and on the merits, the appeals court noted that "[m]ore detailed" statistics might be required to meet the plaintiffs' burden of persuasion on the merits (Pet. A-56). There is no question, however, that plaintiffs' statistical analyses are admissible and probative of class-wide discrimination. *See Bazemore v. Friday*, 478 U.S. 385, 400-401 (1986) (multiple regression analysis need not contain all possible variables to be admissible).

could properly represent a class of both applicants and employees under Rule 23(a). The district court had certified an "across the board" class, simply presuming that the named plaintiff's claim was typical of those of the applicant and employee class members and shared common issues of law and fact. This Court held that Rule 23(a) commonality and typicality cannot be presumed. "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, *that the prerequisites of Rule 23(a) have been satisfied.*" *Falcon*, 457 U.S. at 161 (emphasis added). Significantly, the Court held that the analysis could, in some cases, be based *on the pleadings alone*, while other cases might require the district court to go beyond the pleadings. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160.

The *Falcon* decision stands only for the proposition that the district court may, when necessary, look beyond the pleadings to ensure that there is evidence to support the existence of questions of law or fact, common to the named plaintiff and to the class. Nothing in *Falcon* supports Petitioner's contention that the lower court must, or would be permitted to, adjudicate the merits of any of those "common questions" at the class certification stage.

The *Falcon* standard is consistent with the function and timing of class certification. Class certification is conducted "as soon as practicable" after the filing of the lawsuit to determine whether the preliminary indicia of a

class are present. Fed. R. Civ. P. 23(a). Under these time constraints and with only limited discovery, plaintiffs are not expected to prove the merits of their case at this early stage. Indeed, this Court has expressly prohibited an evaluation of the merits at the class certification stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (nothing in Rule 23 "gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.")[4] Rather, the plaintiffs must only demonstrate that the Rule 23 prerequisites are satisfied.

A simple example illustrates the point. At class certification, the plaintiffs offer the declaration of a former human resources manager who states that the defendant-employer had a company-wide practice of hiring males to fill openings in sales positions. The employer proffers the declaration of a company executive who claims that no such policy exists. Assuming that the plaintiffs' witness was competent and the testimony had proper foundation, the district court assessing class certification could not adjudicate the merits of whether such a policy existed, deciding which witness to believe. The district court would only determine if there is a question about the existence of a company-wide policy that is common to the named plaintiff and the class members.

There is no different standard for assessing evidence of common statistical questions, as opposed to non-statistical questions, at the class certification stage in a Title VII

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[4] Any factual findings at the class certification stage in a disparate treatment case could also run afoul of either party's right to a jury trial. 42 U.S.C. § 1981a(c).

case. Just as the district court cannot weigh the evidence and resolve factual disputes between competing witnesses on core liability questions, the court cannot choose the more persuasive expert analysis at the class certification stage. The issue for the district court is whether the plaintiff's expert testimony tends to show the existence of a common question. While the district court may consider contrary evidence from the defense, class certification is not the stage at which to resolve the disputes on the merits.[5]

D. There is No Conflict in the Circuits About the Application of *Falcon* to Evidence Submitted in Support of Class Certification

As the foregoing plainly demonstrates, the Second Circuit properly applied *Falcon*. It scrutinized the statistical evidence in *Caridad*, without engaging in a premature and preemptive weighing of the evidence. In this regard, the Second Circuit is in line with all other circuit courts,

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[5] Petitioner also suggests that the court must engage in closer scrutiny of the statistical evidence at class certification because this case involves " 'overdelegation' " (Pet. pp. 18 – 19). This Court has long recognized that a company-wide practice of "entirely subjective decisionmaking" may be challenged under both the disparate treatment and disparate impact models. *Falcon*, 457 U.S. at 159 n.15; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). Many such cases are routinely brought under Title VII. *See, e.g., Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259 (N.D. Cal. 1992); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 614 (D. Minn. 2000). Nothing found in these cases nor in Rule 23 would suggest that district courts need to apply a different standard in such cases at class certification.

including the decisions cited by Petitioner.[6] None of those cases demonstrate a circuit conflict, much less a conflict on an "important matter" calling for "an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

For example, in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677-678 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), the Seventh Circuit reversed the lower court's class certification order in a putative breach of warranty class action because the district court wrongly assumed that "the substantive allegations in the complaint are accepted as true for purposes of the class motion." *Szabo*, 249 F.3d at 675. The district court relied solely on the pleadings and failed to look "beneath the surface of [the] complaint to conduct the inquiries identified in that rule and exercise the discretion [Rule 23] confers." *Id.* at 677. The Seventh Circuit's standard in *Szabo* – looking beyond the pleadings to assess the Rule 23 requirements – is completely consistent with the Second Circuit's approach in *Caridad*.

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[6] Petitioner contends that the Second Circuit's recent decision in *Visa Check/Master Money Antitrust Litigation v. Visa, U.S.A., Inc.*, No. CIV.A.00-7699-T, 2001 WL 1242717, at *5 (2d Cir. Oct. 17, 2001) is further evidence that it applies a different standard than the other circuits. Again, Petitioner is mistaken. Both the district court and the Second Circuit in *Visa Check* conducted thorough evaluations of the competing expert opinions. In affirming the district court's grant of class certification, the Second Circuit observed "[t]he question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive." *Visa Check*, 2001 WL 1242717, at *5.

The other cases cited by Petitioner apply the same uncontroversial proposition – the district court may have to look beyond the pleadings to ensure that Rule 23 requirements are satisfied, but not decide the issues on the merits. *Johnston v. HBO Management*, 265 F.3d 178, 188 (3rd Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-168 (3rd Cir. 2001); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Petitioner also relies on two decisions in which plaintiffs' statistical evidence was found not to satisfy Rule 23(a) requirements. The results in these cases are a reflection of the particular evidence and claims in those cases, not the application of a legal standard different than the *Caridad* court. *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990); *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980).[7]

Finally, Petitioner urges this Court to grant certiorari because it contends that erroneous class certification orders may create undue pressure on a defendant to

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[7] In *Chaffin*, the plaintiff simply tallied the 72 promotions made during the relevant period and compared the two promotions received by blacks to the four or five promotions that might be expected if blacks had been promoted in proportion to their representation in the available pool of candidates. This meager showing, together with evidence that the lone plaintiff could not identify any other class member alleging discrimination, was found to be insufficient to establish typicality under Rule 23(a)(3). *Chaffin*, 904 F.2d at 1275-1276. In *Stastny*, the Fourth Circuit did not conclude that the class was improperly certified but, rather, found that the district court should have decertified the class once the record was sufficiently developed so that the evidence of a state-wide practice could be fully assessed. *Stastny*, 628 F.2d at 280-281.

settle rather than risk a trial on the merits (Pet., pp. 13, 21). This is not, however, an argument for Supreme Court review but one for intermediate appellate scrutiny. Rule 23 was amended in 1998 to add subsection (f), which permits interlocutory appellate review of class certification decisions. Among the factors that the appellate courts consider in permitting Rule 23(f) appeals is whether "the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272 (11th Cir. 2000); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). It is the function of the appellate courts to exercise their discretion to ensure that class actions do not proceed to trial based upon erroneous class certification decisions.[8] Petitioner has failed to demonstrate that this concern justifies the extraordinary remedy of a grant of certiorari.

II. REVIEW OF THE RULE 23(b)(2) CERTIFICATION ISSUE WOULD BE PREMATURE SINCE NEITHER THE OUTCOME IN THIS CASE NOR THE EXTENT OF ANY CIRCUIT CONFLICT IS YET CLEAR

A. The Petition Should Be Denied Because Review of the Rule 23(b)(2) Certification Issue Would Be Premature

This Court should not take up this case on the issue of whether a Title VII class action, which includes money

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[8] Even if it were relevant, however, Petitioner has made no showing that the Second Circuit's *Robinson* decision will inappropriately coerce a settlement in this case.

damage claims, may be certified under Rule 23(b)(2). The Second Circuit remanded the class certification motion to the district court for certification of the disparate impact claim and for further consideration and certification of the disparate treatment claim based upon several alternatives. Until the district court has determined which method best fits the particular facts of this case, it is unclear what, if any, important legal and practical issues are implicated and review now would be premature.

The Second Circuit instructed the district court to:

> certify the disparate impact claim under Rule 23(b)(2) . . . [and] reconsider the propriety of certifying the entire pattern-or-practice disparate treatment claim in light of the standard set out herein. If the court determines in its discretion that (b)(2) certification of the entire claim is still inappropriate, then the district court shall bifurcate the pattern-or-practice claim and certify the liability stage under Rule 23(b)(2).

(Pet. A-38). It also suggested that departmental subclassing might be appropriate. *Id.* at A-37. Consistent with the Second Circuit's opinion, the district court may choose from at least four alternatives in making its class certification order.[9] It may certify the pattern and practice claim under Rule 23(b)(2); it may certify under Rule 23(b)(2) and order notice and opt-out rights under Rule 23(c)(2); it may order bifurcation and partial certification of the liability phase only; or it may require subclasses. Moreover,

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[9] There is no dispute that the disparate impact claim, which does not provide damage remedies or jury trial rights, may properly be certified under Rule 23(b)(2). Petitioner has not sought review of this part of the opinion.

as the Second Circuit recognized, class certification orders are provisional and "the district court retains discretion to modify the certification structure on remand as warranted by the progression of the case" (Pet. A-37).

Thus, the district court may select from a number of different approaches to class certification here. Each approach raises distinct legal issues, which may or may not be appropriate for review. Moreover, this Court would benefit from analyzing those issues in the context of the full record below, since many of the objections raised by Petitioner are practical issues about the management of Title VII class actions – concerns that may, in practice, never materialize. The Court retains authority to review the class certification decision at the conclusion of the litigation.

B. There Is Not a Sufficient Circuit Conflict to Warrant Supreme Court Review on the Issue of Whether Title VII Class Actions, Which Include Compensatory Damage Claims, May Be Certified Under Rule 23(b)(2)

There is not a sufficient circuit conflict to warrant immediate review of the standard for Rule 23(b)(2) certification in Title VII class actions, which include money damages. It has only been since the passage of the 1991 Civil Rights Act that Title VII plaintiffs could seek compensatory and punitive damage remedies for claims of intentional discrimination, as well as the right to a jury trial. Appellate courts are just beginning to address the implications of these changes for Title VII class actions. In wrestling with these issues, the lower courts have been

guided by this Court's observation that civil rights class actions are well-suited to certification under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) cases).

To date, only three Circuits – the Fifth, Seventh and Second – have directly addressed the effect of damage claims on class certification in Title VII cases.[10] Nine circuits have *never* addressed the issue. The law in the Fifth Circuit – upon which Petitioner grounds its conflict

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[10] Petitioner cites two other circuit opinions, neither of which involved Title VII discrimination class actions, nor squarely addressed the issue presented here. *Butler v. Sterling*, No. CIV.A.98-3223-T, 2000 WL 353502, at *6-7 (6th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001). In *Butler*, an unpublished opinion, the Sixth Circuit affirmed the denial of Rule 23(b)(2) class certification for a Truth-in-Lending Act claim, which involved claims for statutory and actual damages. While the Sixth Circuit noted the "incidental damages" test from *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the district court, in fact, applied the *Robinson* standard – whether, based on the facts of that case, injunctive relief was the primary relief sought. "The Court finds that the realities of the litigation demonstrate that the primary relief sought by plaintiff is monetary relief. . . . " *Butler*, 2000 WL 353502, at *7. The *Murray* case challenged the denial of services to allegedly disabled Medicaid-eligible plaintiffs under the Americans with Disabilities Act. Since plaintiffs had not established standing, the action was remanded. In dicta, the court cited *Allison* for the proposition that damage claims would predominate in this case since individual circumstances of each class member would have to be addressed. However, the Court remanded to allow for consideration of whether Rule 23(b)(3) standards could be met.

argument – continues to be very much in flux. Rather than review this issue prematurely, this Court should allow the appellate courts an ample opportunity to consider these issues in the context of fully-litigated cases.

The Fifth Circuit's decision in *Allison v. Citgo Petroleum* was the first post-1991 Act appellate decision to consider the implications for class certification of the inclusion of damage claims. The panel ultimately issued three different decisions in *Allison*, leaving its final holding very much in doubt.

The district court in *Allison* had denied class certification under Rule 23(b)(2), concluding that monetary damages – in that case, compensatory and punitive damages – were the predominant form of relief. *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463 (W.D. La. 1995). On May 15, 1998, the Fifth Circuit panel issued an opinion that affirmed 2-1 the district court's order. The plaintiffs sought en banc review, incorporating the reasoning of the dissenting judge's opinion. The Fifth Circuit then took the unusual step of withdrawing the May 15, 1998 opinion and replacing it with a new decision dated August 18, 1998. *Allison*, 151 F.3d 402 (5th Cir. 1998).

In the new opinion, the panel held that, in determining the propriety of Rule 23(b)(2) certification, the trial court must find that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief." *Id.* at 415 (emphasis added). It defined "incidental" to mean "damages that flow directly from liability to the class *as a whole* on the

claims forming the basis of the injunctive or declaratory relief." *Id.* (emphasis in original).[11]

The *Allison* story was not yet over. Following the issuance of the August 18 opinion, the plaintiffs filed a second suggestion for rehearing and en banc consideration. On October 2, 1998, the panel majority issued the following *per curiam* order, denying the request:

> Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. In denying rehearing, the panel majority makes the following observation: The trial court utilized consolidation under rule 42 rather than class certification under rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability and issues that are common to the class and to certify for class determination those discreet liability issues.

Allison, 151 F.3d at 434. The order raised serious question about the precedential value of the August 18 opinion.

Arguably, the August 18 decision in *Allison* precludes certification under Rule 23(b)(2) of *any* Title VII case seeking compensatory and punitive damages. Indeed, Petitioner places the weight of its argument regarding circuit conflict on the differences in outcome between

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[11] *Allison* also included an extensive discussion of Rule 23(b)(3). Since the *Robinson* court did not address any claims under that subsection, there is no conflict presented among the circuits on (b)(3) standards.

Allison and *Robinson*. Yet, in a subsequent decision, *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), the Fifth Circuit clarified that *Allison* did not create a per se bar to money damages in (b)(2) actions. "It is also plain that the presence of any amount of money damages does not result in a per se finding of predomination." *Id.* at 408. It further noted that "*Allison* recognized that providing rule 23(b)(2) class members with the procedural safe guards of notice and opt-out can permit civil rights class actions to proceed under the rule." *Id.* The language in *Smith* plainly suggested that the Fifth Circuit's "bright line" was not nearly so bright.

Further clouding the issue, the Fifth Circuit recently *withdrew* its opinion in *Smith*. *Smith v. Texaco, Inc.*, No. CIV.A.00-40337-T, 2002 WL 131415 (5th Cir. Feb. 1, 2002). At this point, the pronouncements of the Fifth Circuit are so confused that it is not clear what the conflict with the Second Circuit may be.

The Seventh Circuit's approach to the issue shares many similarities with the Second Circuit's decision in *Robinson*. In *Jefferson v. Ingersoll Intern, Inc.*, 195 F.3d 894 (7th Cir. 1999), the Seventh Circuit expressed concern about the inclusion of compensatory and punitive damage claims in a Rule 23(b)(2) class, if notice and opt-out rights were not provided. The Seventh Circuit remanded the case so that the district court could determine whether money damages were more than incidental to the equitable relief. Judge Easterbrook suggested various alternatives if Rule 23(b)(2) certification was inappropriate. The district court could certify under Rule 23(b)(3) for all purposes, certify under Rule 23(b)(2) and provide for notice and opportunity to opt out, or finally employ

"divided certification" – bifurcation with certification of equitable issues under 23(b)(2) and damage issues under 23(b)(3). While *Jefferson* suggests that (b)(2) cases should be limited to cases where damages are incidental, the Seventh Circuit's analysis leaves open the possibility of certification under both (b)(2) and (b)(3), even where compensatory and punitive damages are present. *Accord Lemon v. International Union of Operating Engineers*, 216 F.3d 577, 581-582 (7th Cir. 2000).

In *Robinson*, the Second Circuit adopted an "ad hoc" rule which allowed the district court to use (b)(2) certification if:

> it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," . . . and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

(Pet. A-23) (citation omitted). In assessing whether injunctive relief predominates in a particular case, the district court should satisfy itself that: "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits" (Pet. A-23). Finally, the court cautioned that "[i]nsignificant or sham requests for injunctive relief should not provide cover" for cases that were, in fact, essentially for monetary relief. *Id.*

The Second Circuit reasoned that its approach was consistent with Rule 23, which has historically vested authority in the district courts to determine when the certification requirements have been met. The "ad hoc" rule also provided the most effective means for the court to ensure both judicial efficiency and the due process rights of absent class members. Like the Seventh Circuit, the *Robinson* court recognized that the district court could certify under 23(b)(2) and order notice and the right to opt-out pursuant to Rule 23(d)(2) to fully protect the class members' interest in money damage claims.

While the Second Circuit and the Fifth Circuit have adopted somewhat different standards on the limited issue of how to determine whether a case is predominantly for monetary damages, it is not clear that this difference in language will ultimately lead to a difference in results. Moreover, as discussed below, there is no disagreement among the circuits that bifurcation and partial certification is another alternative method to manage certification under 23(b)(2). Until other circuits have had an opportunity to consider this issue, the extent of the circuit conflict is not sufficient to warrant the Court's review. It is particularly important that the circuits have the benefit of complete trial records below so that the intensely practical problems raised by varying approaches to class certification can be fully explored.

Even if there were a sufficiently, well-developed conflict in the circuits, this would not be an appropriate vehicle to consider the issue. Because in this case the defendant is a public entity, there is no claim for punitive damages (Pet. A-68). Punitive damages were, however, an important component of the Fifth Circuit's decision in

Allison. *Allison* concluded that a claim for punitive damages precludes certification under Rule 23(b)(2) because such damages were not a group remedy and therefore did not meet its definition of "incidental damages." *Allison*, 151 F.3d at 417-418 (citations omitted). The analysis in *Jefferson* was also based on both compensatory and punitive damage claims. *Jefferson*, 195 F.3d at 896.

C. There Is No Circuit Conflict on the Issue of Partial Certification Under Rule 23(b)(2) of the Liability Issues Only

As noted above, the Second Circuit ordered the district court to reconsider certification of the pattern-and-practice claim under the standard discussed in its opinion. It directed that if the lower court determined that 23(b)(2) certification of the entire claim was still inappropriate, the district court should "bifurcate the pattern-or-practice claim and certify the liability stage under rule 23(b)(2)" (Pet. A-38).

This Court has long endorsed the use of bifurcation to manage Title VII class actions. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-362 (1977). The discrete issue of pattern-or-practice liability is tried first. In the event that the defendant prevails, the parties avoid the necessity of the remedial phase (Pet. A-30 – A-31). If the plaintiff prevails, the parties then turn to fashioning remedial proceedings that are consistent with the liability findings and due process requirements. Since the 1991 amendments, many district courts have used bifurcation as a means to manage Title VII cases that

include compensatory and punitive damage claims.[12] The Seventh Circuit has expressly endorsed the use of bifurcation as a means of managing Title VII class actions that include claims for compensatory and punitive damages. *Jefferson*, 195 F.3d at 898; *Lemon*, 216 F.3d at 581-582.[13]

Contrary to Petitioner's assertion (Pet., pp. 28-29), the *Allison* decision did not reject the use of bifurcation; it expressly did not reach it. The *per curiam* order, described above, observed: "We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability and issues that are common to the class and to certify for class determination those discreet liability issues." *Allison*, 151 F.3d at 434. *See Jefferson*, 195 F.3d at 898 (*Allison* rehearing order "suggest[s] the possibility of a partial or split class certification . . . "). There is, thus, no conflict among the

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[12] *See, e.g., Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349 (E.D. Mo. 1996); *Butler v. Home Depot, Inc.*, No. CIV.A.C-94-4335-SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996); *Shores v. Publix Super Markets, Inc.*, No. CIV.A.95-1162-T-25(E), 1996 WL 407850 (M.D. Fla. March 12, 1996); *Adams v. Pinole Point Steel Co.*, No. CIV.A.C-92-1962-MHP, 1994 WL 515347 (N.D. Cal. May 18, 1994).

[13] In a footnote, Petitioner refers without explanation to a "serious question" as to whether multiple trials would violate the Seventh Amendment's Reexamination Clause (Pet. at 27, n.17). Both the Seventh Circuit in *Lemon* and the Second Circuit in *Robinson* have concluded that divided certification does not run afoul of the Seventh Amendment. *Lemon*, 216 F.3d at 582; Pet. A-32 n.13. While the *Allison* decision discusses potential concerns about the Seventh Amendment, those were in the context of its Rule 23(b)(3) analysis.

appellate courts about the propriety of partial (b)(2) certification in Title VII class actions.

III. THE PETITION SHOULD BE DENIED WITH RESPECT TO THE THIRD QUESTION PRESENTED

Petitioner lists a third Question Presented, but provides no explanation as to what the issue is or why it merits immediate review by writ of certiorari. Based on Respondents' reading of the Question, there is no basis for granting certiorari on this issue either.

Petitioner appears to challenge the determination in *Robinson* that the named plaintiffs, who have settled their individual damage claims, are nonetheless adequate class representatives. The issue arose because of the unique terms of a settlement stipulation, which resolved the plaintiffs' damage claims but allowed them to pursue the class certification appeal (Pet. A-35 – A-37). The Second Circuit concluded that the named plaintiffs retained an interest in class-wide injunctive relief and that it was premature to assume that they would not vigorously pursue it. The Second Circuit directed the district court to re-visit the issue at the appropriate time and, if necessary, require the appointment of additional named plaintiffs. This sensible and correct resolution by the Second Circuit, arising from the terms of an unusual, case-specific stipulation, presents no basis for certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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